No. 461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

UNITED STATES OF AMERICA,

Appellant,

v.

COLUMBIA STEEL COMPANY, CONSOLIDATED STEEL CORPORATION, UNITED STATES STEEL CORPORATION, AND UNITED STATES STEEL CORPORATION OF DELAWARE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF FOR CONSOLIDATED STEEL CORPORATION

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Outline of Case and Summary of Argument

Appellant's Point I—

Commerce would be restrained in *rolled steel products.* Basis of charge—Consolidated will no longer be a buyer of rolled steel products from others than U. S. Steel.

Refutation (Our Point I)—*

There is no illegal restraint in the sale of rolled steel products because:

1. During the ten year period from 1937 to 1946 Consolidated's purchases of rolled steel products from

* All refutation points will appear in the ensuing text typographically emphasized.

CITATIONS

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OPINION BELOW

The opinion, rendered simultaneously with the entry of judgment in favor of the defendants in the court below (the United States District Court for the District of Delaware), is reported in 74 Fed. Supp. at page 671 *et seq.* (R. 54-67).

JURISDICTION

The jurisdiction of this court to review by direct appeal the judgment entered in this cause rests upon Section 238 of the Judicial Code, as amended (43 Stat. 936, 28 U.S.C. Sec. 345). Probable jurisdiction was noted by this court on December 22, 1947, (R. 687).

STATEMENT OF THE CASE

A restatement of the facts seems necessary because the "Questions Presented" and the "Statement" contained in appellant's brief omit essential facts and draw or suggest unwarranted inferences. They thus fail to make possible an adequate appraisal by this Court of the issues involved.

History of the Litigation

This action was begun by the United States of America, upon a complaint filed in the United States District Court for the District of Delaware, against four corporations, Columbia Steel Company, Consolidated Steel Corporation, United States Steel Corporation and United States Steel Corporation of Delaware. (For purposes of brevity, and unless otherwise indicated, Columbia Steel Company will be referred to herein as "Columbia", Consolidated Steel Corporation as "Consolidated", United States Steel Corporation as "U. S. Steel", and United States Steel Corporation of Delaware as "U. S. Steel of Delaware". The designations, "U. S. Steel", and Consolidated may be deemed to include not only those companies but also their respective subsidiaries).

The complaint (R. 1-4) sought an injunction against the consummation of an agreement, dated December 14, 1946, as amended (which will sometimes be referred to herein as the "sale contract") between Columbia, as the buyer, and Consolidated as the seller, wherein Columbia agreed to purchase and the seller agreed to sell all of its business and operating assets. It was alleged by the plaintiff in the complaint that *the necessary effect of the agreement* referred to would be to eliminate substantial competition in the sale of rolled steel products and in the manufacture and sale of fabricated steel products within

an area designated as the "Consolidated Market" and that said agreement was, *therefore, in itself an unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act.* The complaint also alleged that in making the agreement referred to, Columbia, United States Steel Corporation and U. S. Steel of Delaware concertedly attempted to monopolize the production and sale of fabricated steel products in the "Consolidated Market" in violation of Section 2 of the Sherman Act. It consequently sought to enjoin all of the defendants from taking any further steps to consummate the agreement or similarly to restrict competition and to enjoin Columbia, United States Steel Corporation and U. S. Steel of Delaware from any further similar monopolistic attempts. The "Consolidated Market" was described in the complaint as being the States of Arizona, California, Idaho, Louisiana, Montant, Nevada, New Mexico, Oregon, Texas, Utah and Washington.

Prior to trial the plaintiff applied for a preliminary injunction co-extensive in effect with the final relief prayed for in the complaint. The court, with the consent of the defendants, made its order restraining the defendants from transferring any of the assets agreed to be sold or from paying any part of the purchase price therefor, pending the final determination of the cause, but refused to enjoin them from "taking any further steps to consummate the said agreement".

Thereafter, the case proceeded to trial on the merits and on November 7, 1947, the Court rendered its decision, stating "that the evidence in the case fails to establish any violation of the Sherman Act", and dismissed the complaint.

Although the complaint was framed upon the theory merely that the *effect* of the agreement would be to eliminate substantial competition in the sale of rolled steel products and the manufacture and sale of fabricated steel

products, appellant departed from that theory and claimed that such eliminations were its *purpose.* It was demonstrated to the Trial Court and we shall now show that there is no support in the record for the changed theory or the arguments advanced in its support; that the contract was not *designed* or *intended* to effect any restraint; that it was not an attempt to monopolize; that consummation of the contract will not accomplish any of such purposes; and that the rules laid down by this Court in the cases relied upon by appellant have no application to the case at bar.

Description of the Business Affected

The steel industry may be divided, logically, into three separate branches. The first is the manufacture of rolled steel products from iron ore, and their sale to the various processors thereof. Such products consist largely of sheets, shapes, plates and bars, although other miscellaneous steel products are produced by steel manufacturers in their mills. Certain of the subsidiary corporations of United States Steel Corporation are engaged in such production and in the sale of such rolled steel products. Consolidated, however, does not have the plants, resources or facilities to carry on that type of business and consequently does not produce nor has it ever produced any rolled steel products.

The second branch is the mass production from rolled steel products, by repetitive processes of manufacture, of standard commercial products, such as wire, nails, bolts, nuts, automobile frames, refrigerator boxes and other generally similar articles (R. 143-4). Such manufactured products are of standard type and design and are sold to dealers, jobbers or users thereof, either for resale or for use in the manufacture of other end products. Consolidated does not engage in any such manufacturing activities (R. 143).

The third branch (in which Consolidated is engaged) is the fabrication, from rolled steel products, of either *structural* or *plate* products or both. Steel products (either

structural or plate), so fabricated, are designed for a single and particular purpose to the customer's special order and usually according to plans and specifications furnished by the customer to the fabricator. Such work is performed almost entirely on the basis of competitive bidding, although, in some instances, contracts may be obtained on a non-competitive negotiated basis. In all instances, however, specific types and quantities of fabricated products are made to meet the customer's individual requirements (R. 143-4, 145-6).

As indicated above, steel fabrication is in turn divided into *structural* fabrication and *plate* fabrication. Some steel fabricators are equipped to fabricate both structural and plate products but the business of many of them is restricted, solely or largely, to either plate or structural work.

Structural fabrication is concerned principally with the fabrication of buildings, bridges, transmission towers and similar permanent structures (R. 143-4). In such operations, rolled steel shapes are used principally, although plate steel may be employed incidentally in the building of trusses or in the assembly or erection of the completed product (R. 402).

Plate fabricators are engaged in the production of tanks, gasholders, welded pipe, corrugated culvert pipe, penstocks, pressure vessels, and similar products, fabricated principally from steel plates or sheets, with only such incidental quantities of shapes, angles or bars as may be required in the assembly of the completed article (R. 145, 402).

The facilities required for structural fabrication are quite different from those required for plate fabrication. In a structural fabricating shop, there is a large amount of equipment for shearing, punching, drilling, assembling and riveting or welding structural shapes together to form the final product (R. 145). A plate fabricator requires other types of equipment: shears, edge planers, a large number of bending, rolling and forming machines, hydraulic

presses and the like for the production of complicated sections and, in particular, large and high areas in which plates can be fitted together for welding or riveting (R. 147). Consolidated's business is predominantly (over 70%) *plate* fabrication.

Factual Background of the Contract Complained of

Consolidated Steel Corporation was organized in December, 1928, so that as a practical matter it began business in the year 1929, which marked the beginning of the depression period. The company struggled through this era although its fortunes in time declined to a point where it was necessary to pass dividends on its preferred stock for several years. About 1936, its position began to improve, and with the beginning of the Government's defense program in 1940 its operations were greatly expanded. After the end of hostilities the company's president, Mr. Alden G. Roach, was mindful of the bitter struggle for survival during these earlier years of the company's history and also of the fact that the steel fabricating industry is a highly cyclical one. He therefore felt called upon to decide whether the best interests of the shareholders would be served (a) by selling the company's operating assets, if a favorable price could be obtained, or (b) by allowing the company's assets to remain committed to the vicissitudes of its business. After full consideration, Mr. Roach concluded that he should explore the possibility of effecting a sale, if one could be made, that would be favorable to the shareholders and would reasonably assure the continued operation of the company's plants as well as the continued employment of its personnel (R. 342, 353-4).

Following his decision in this regard, Mr. Roach approached Bethlehem Steel Company with the suggestion that it purchase the company's assets but his efforts were without success (R. 350).

Thereafter, in September, 1945, Mr. Roach, with the knowledge that U. S. Steel had no fabricating plants in the

West, although Bethlehem, its strongest competitor, had an established fabricating business there, proposed to Benjamin F. Fairless, U. S. Steel's president, that Consolidated sell its physical assets to that corporation. On that occasion Mr. Fairless listened to Roach's suggestions but did not comment thereon (R. 342, 376).

In the latter part of February or in the early part of March, 1946, Roach again approached Fairless with the same proposal and was met with the answer that it was an interesting subject but that at that time U. S. Steel was considering the possibility of bidding on the Geneva Steel Plant at Geneva, Utah, and that he, Fairless, would not discuss the Consolidated proposal further until the Geneva matter had been disposed of. After the acquisition of the Geneva plant by U. S. Steel, Fairless called Roach on the telephone and on several occasions discussed the latter's suggestion, with the result that a committee, consisting of members of U. S. Steel's staff was appointed to survey the Consolidated plants and properties. Following that committee's report Fairless appointed another committee to conduct negotiations for the purchase of the Consolidated assets.

Previous to that time, American Bridge Company, a subsidiary of United States Steel Corporation, had considered the construction of fabricating plants to be located on the Pacific Coast, where Bethlehem Steel Company, U. S. Steel's principal competitor, long before had established such facilities. As a result a decision had been reached that there should be two plants located there, one in the Los Angeles and one in the San Francisco area, and lay-outs of the plants and of the equipment to be installed were made. Various representatives of the company made several trips to the Pacific Coast to examine available locations, and a tentative estimate of the cost of the plants had been prepared. All of these steps were taken prior to the commencement of World War II (Fdg. 33, R. 45; R. 375-6).

The negotiating committee, appointed by Mr. Fairless,

estimated the volume of business that could be handled with the Consolidated facilities and computed the replacement costs of its plants, plus the amount that would have to be spent in improving them to fit U. S. Steel's plans. It also determined that under existing conditions two or three years would be required to duplicate such facilities.

The result of the conclusions reached by the managements of U. S. Steel and Consolidated as to their respective objectives was that the sale of Consolidated's operating assets to U. S. Steel was agreed upon and the sale contract was entered into (R. 323-4, 342-3, 377-80).

Facilities of the Defendant Companies

United States Steel Corporation owns all of the outstanding capital stock of American Bridge Company and Virginia Bridge Company. These corporations, whose plants are all located east of the Mississippi River, are the only two subsidiaries of United States Steel Corporation that are engaged in the fabrication of structural steel products (R. 140-1). Neither United States Steel Corporation nor any of its subsidiaries are equipped to or do fabricate plate products (R. 147). Consolidated is engaged in the fabrication of both *structural* and *plate* products, although by far the greater part of its work (over seventy per cent) consists of *plate* fabrication (Dfts. Exs. 59, 60, R. 614, 615). It is within the area of less than thirty per cent of its business, therefore, that Consolidated *can* be in competition with U. S. Steel; and even in this common area, as we shall show, U. S. Steel and Consolidated normally bid on different types of structural fabricating jobs. Furthermore, many other companies compete actively with U. S. Steel in the fabrication and sale of structural products and with Consolidated in the fabrication and sale of both structural and plate products (Dfts. Exs. 1, 2 and 3, R. 579-583), as will be hereinafter shown.

Of Consolidated's fabricating plants, only two, those at Maywood, California, and Orange, Texas, are equipped

with facilities designed for sufficient for the fabrication of structural products, except that the small plant at Phoenix, Arizona, performs some structural work of light-weight character. The Maywood plant contains facilities also for the fabrication of plate products and the plants at Vernon, South San Francisco, Berkeley and Fresno, all in California, are solely plate fabricating plants, the latter two serving but very limited areas adjacent to each. Consolidated also operates a small plant at Taft, California, employing about 45 men which is devoted to the installation and repair of tanks, pipe and other similar products in its immediately surrounding area, but has no fabricating facilities (R. 333-5).

Within the area of structural fabrication Consolidated is not equipped to produce the larger and heavier types of end products that are the specialties of American Bridge Company and Virginia Bridge Company (Testimony of Obbard, R. 157-202) and there will appear herein basic and elementary reasons why these latter two fabricators do not compete with Consolidated in the fabrication of the lighter types of structural products.

Facts as to Competition in Rolled Steel Products

Appellant originally adopted the ten years from 1937 to 1946, inclusive, as the period illustrative of the position of the appellees in their potential market and of the competitive situation that exists between them and others. This period (which we will sometimes hereinafter refer to as the "test period") can hardly be considered as typical of normal conditions, since it embraces not only the war years, from 1942 to 1945, inclusive, during which sales and purchases of steel products were substantially distorted by the demands of wartime production but also the year 1946 during which the same abnormal situation continued to exist (R. 392). In any event, we shall address ourselves to the existent circumstances during the test period and shall point out, to the extent necessary, the variances resulting from the wartime and post-war situation.

During the test period, Consolidated's purchases of rolled steel products from U. S. Steel and from others, as compared to the total distribution of rolled steel products in the United States and the total sales of rolled steel products in the Consolidated Market, are shown in the following table:

	1.	2.	3.	4.	5.	6.
	Total-Distribution of Rolled Steel Products in U.S.*	Total Sales of Rolled Steel Products in the Consolidated Market**	Total Purchases by Consolidated from Subsidiaries of U. S. Steel Corp.***	% Of Col. 3 to Col. 2	Total Purchases by Consolidated from others than U. S. Steel Corp.'s Subsidiaries***	% Of Col. 5 to Col. 2
1937	38,345,158	4,362,900	59,677	1.4	43,609	1
1938	21,356,398	2,670,000	23,240	.9	20,810	.8
1939	34,955,175	3,630,000	43,179	1.2	26,685	.75
1940	45,965,971	4,337,990	51,982	1.2	65,662	1.5
1941	60,942,979	6,008,757	88,316	1.5	75,112	1.3
1942	60,591,052	8,489,204	181,492	2	158,219	1.8
1943	62,210,261	10,124,831	170,684	1.7	233,496	2
1944	63,250,519	9,587,503	120,417	1.3	270,115	2.9
1945	56,602,322	7,232,590	67,371	1	157,902	2.2
1946	48,993,777	6,000,000	83,846	1.7	94,823	1.6
	493,213,612	62,443,775	890,204		1,146,431	

*Defendant's Exhibit 38.
**Defendant's Exhibits 42 and 43.
***Defendant's Exhibit 44; Plaintiff's Exhibit 2, Defendant's Exhibit 63.

From the foregoing table it becomes readily apparent that Consolidated's purchases of rolled steel products from others than U. S. Steel, even in the restricted area of the Consolidated Market, were of but negligible consequence. Such purchases ranged annually from a maximum of two and nine-tenths per cent of the total sales in 1944 (at the height of Consolidated's wartime production) to a minimum of seventy-five hundredths of one per cent thereof in 1939. Throughout the ten-year period referred to Consolidated's purchases from others than U. S. Steel represented less than two per cent of the total sales within the

Consolidated Market. The elimination of Consolidated as a potential purchaser of rolled steel products from others than U. S. Steel could therefore have no material effect upon the commerce in such products in that market. When Consolidated's purchases of such products are compared with the total sales in the larger area of the entire United States, such purchases, being less than three-tenths of one per cent of such sales for the entire ten-year period, are of no consequence whatsoever.

During the same ten-year period the total industry production of all steel products was 493,213,612 tons (Dfts. Ex. 38, R. 590). U. S. Steel's production amounted to 163,957,691 tons (Dfts. Ex. 39, R. 591) and, therefore, others than U. S. Steel produced 329,255,921 tons. Assuming that Consolidated had purchased all of its requirements of rolled steel products (2,036,635 tons) from others than U. S. Steel, such purchases would have been slightly more than six-tenths of one per cent of their total production. This almost infinitesimal quantity, therefore, (even under the exaggerated situation assumed) is the maximum reduction in sales of U. S. Steel's competitors that could result from the removal of Consolidated as a potential purchaser of rolled steel products.

The assumption that Consolidated would satisfy all of its requirements by purchases from producers other than U. S. Steel is made only to illustrate further the absurdity of appellant's argument in this regard. In actuality, Consolidated has purchased in the past but forty-three and seven-tenths per cent (Dfts. Ex. 44, R. 595) of its requirements from U. S. Steel and may, therefore, reasonably be expected similarly to secure its future requirements. Upon that basis, the loss of its remaining business to U. S. Steel's competitors would be only twenty-seven hundredths of one per cent of their total production.

For the five years from 1937 to 1941, both inclusive, which, for the reasons above mentioned, are more truly indicative than the entire test period, the purchases of

rolled steel products by Consolidated from others than U. S. Steel amounted, as the table shows, to less than one and two-tenths per cent of the total sales of such products in the Consolidated Market and to slightly more than one-tenth of one per cent of the total distribution of such products in the United States. It appears to be beyond serious argument that the elimination of such a negligible percentage of purchases from either the total nation-wide or total Consolidated Market distribution could, in the wildest flights of fancy, be considered to be a substantial restraint of commerce.

It is also apparent that the effect of the elimination of Consolidated as a customer cannot be calculated solely on the basis of total sales in only the Consolidated Market. The fact that a consumer in a circumscribed locality is eliminated from the market does not deprive its suppliers of the ability to distribute their products among other consumers located elsewhere. It is patently absurd to assume that the market of the large steel producers of the United States is geographically restricted to an area surrounding their various respective plants. On the contrary it is common knowledge that the market for the sale of rolled steel products is one of wide geographical extent and in many respects a national one.*

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*Appellant, in emphasizing what it calls "the decisiveness of the geographical location" (App. Br. p. 15) reaches outside the record and asks this Court to believe that, of 333,865 tons of rolled steel products purchased by Consolidated from Columbia during 1937-1941 and 1946 all were West Coast products because Columbia was "a West Coast producer." In its footnote on the same page the same assumption is made as to steel purchased from Bethlehem.

Such assumptions or conclusions as appellant thus urges the Court to make have no foundation in fact and we regret that it becomes necessary to refute them with assertions which likewise do not appear in the transcript but such necessity does exist in order that the truth and not a false implication may be the basis of this Court's decision. We thus state the actual facts realizing that they stand solely with such authenticity and credit as they may gain from the willingness of counsel for this appellee to present them.

Just as Columbia acted as the selling agent in California (and other western states) for the products of American Bridge Company and Virginia Bridge Company so did it function with respect to the products of other steel producing subsidiaries of United States Steel Corporation

Facts as to Competition in Fabricated Steel Products

Consolidated has engaged in the steel fabricating business since its formation in December, 1928. Its activities are conducted and its customers are located in an area where competition in steel fabrication is extremely active and intense (R. 335, 6).

It has been shown that there were, in addition to Consolidated, sixty-four structural fabricators whose plants were located in the Consolidated Market, and it further appears that, to the knowledge of U. S. Steel, ninety-seven fabricators whose plants were located either within or without the Consolidated Market have competed successfully against American Bridge Company or Virginia Bridge Company for business within that area (Dfts. Ex. 1, R. 579-83).

An analysis of the type of work performed and of the products manufactured by Consolidated discloses accurately the limits within which its products are competitive with those of any subsidiary of United States Steel Corporation. For convenience in such consideration, it is desirable to eliminate at the outset the types of products as to which no competition exists.

Shipbuilding.

During the war years, acting under Government sponsorship, Consolidated constructed ships for defense and war purposes for various Government procurement agencies but it is no longer engaged in this field (R. 341). Consolidated's war work was confined to ship and ordnance

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and the total of 333,865 tons of rolled steel products sold to Consolidated were not, for the greater part, produced in west coast mills, nor were such mills capable of producing many types of the products so sold. The same is true of the total purchased from Bethlehem, in so far as its own producing plants were concerned. Consolidated's records indicate that during the years 1937-1941 and 1946 its deliveries of rolled steel products from western mills totaled 208,093 tons and from eastern mills 495,848 tons; or approximately 74% from East Coast producers and 26% from West Coast producers—not 80% from West Coast producers as appellant has stated.

construction with Government furnished facilities, all of which have now been abandoned. Consolidated Shipyards, Inc., a Consolidated subsidiary operating a small boat yard, has disposed of its plant to a group of real estate speculators (R. 341). There is, therefore, no competition between U. S. Steel and Consolidated in the shipbuilding business.

Steel Pipe.

As the testimony shows, Consolidated is engaged in the business of manufacturing welded pipe. Such pipe is fabricated in five of its plants. In the Maywood and South San Francisco plants it manufactures large diameter pipe, that is, pipe in excess of 26 inches in diameter, and in the Vernon plant it manufactures pipe of smaller diameter. In the Berkeley plant it manufactures pipe of from four to eighteen inches in diameter, with light gauge walls, for irrigation purposes. In the Phoenix plant it manufactures water well casing and corrugated culvert pipe. All of this pipe made by Consolidated is welded from plate by either the fusion weld or electric weld process (R. 336-8).

No such pipe is manufactured by any of the subsidiaries of United States Steel Corporation. Its only subsidiary engaged in the pipe manufacturing business is National Tube Company, and the latter's products used in the oil industry are sold by Oil Well Supply Company. Its pipe consists of wrought steel pipe and tubing and is produced in four general classifications. The first is drill pipe casing and tubing, used in the drilling of oil wells, which is commonly known in the trade as "oil country goods." The second is known as "standard pipe" and is the common pipe sold for construction purposes, *e.g.*, household piping, plumbing, heating and refrigeration. The third classification is known as "line pipe," which is divided into two general categories, one of which is trunk line pipe, which goes into the long and large oil pipe lines, and the other of which is miscellaneous line pipe for smaller sundry mis-

cellaneous uses. The fourth classification is tubing specialties, such as boiler tubes, steam tubes, refinery pipe, mechanical tubing, automotive tubing, airplane tubing and the like. Pipe in the fourth classification consists of only two kinds: butt-weld pipe in diameters up to three inches, and seamless pipe in diameters from two inches up to but not in excess of 26 inches. The trunk line pipe is all seamless pipe for high-pressure uses. Oil Well Supply Company also sells various other items (R. 279), some of which are manufactured by it and some of which it acquires from others.

The pipe made by Consolidated and its subsidiaries has, generally, different gauges, lengths and uses than the pipe manufactured and sold by National Tube and Oil Well Supply (R. 279, 281, 291). Consolidated's pipe is largely (and particularly in diameters of less than 26 inches) light pressure pipe, and National Tube Company's products do not compete with it since that company manufactures high pressure pipe only (R. 280). The cost of the welded pipe manufactured by Consolidated varies substantially from the cost of pipe of similar diameters manufactured by National Tube and therefore cannot be sold competitively with National Tube's products (R. 282, 340). It appeared, from the testimony (R. 340-1, 282-3), that the only instances in which there is any apparent competition between National Tube and Consolidated are those recent ones where, because of the current acute shortage of pipe and the inability of pipe manufacturers to supply the demand, the consumer, faced with the necessity of having line pipe immediately, was willing to pay the higher price for Consolidated's pipe in order to meet his current demands regardless of the expense involved. It is obvious that there cannot be competition in these two classes of products where neither National Tube nor Oil Well Supply manufactures or sells any pipe having a diameter greater than 26 inches, and where in the smaller diameters the pipe man-

ufactured and sold by those companies is not comparable in specifications, cost or use to that manufactured by Consolidated (R. 420-428, 546-555).

William F. McConnor, Vice President of National Tube for many years, and Alden G. Roach, President of Consolidated Steel Corporation, qualified experts in the field, each testified unequivocally that there was no competition between the products of National Tube Company and Oil Well Supply Company on the one hand and Consolidated on the other and these witnesses have not been contradicted.

Mr. McConnor's testimony on this subject may be paraphrased as follows (R. 278-283):

> The products of National Tube are wrought steel pipe and tubing divided into four general classifications, (1) oil country goods, which is drill pipe, casing and tubes used in the drilling of oil wells, the sale of which is the bulk of Oil Well Supply's business, (2) standard pipe for construction purposes, house piping and the like known as ordinary merchant pipe or standard pipe for plumbing, heating and refrigeration, (3) line pipe which is divided into trunk line pipe for long and large pipe lines and miscellaneous line pipe for smaller sundry miscellaneous uses, and (4) tubing specialties, such as boiler tubes, steam tubes, refinery pipe, mechanical tubing, automotive tubing, airplane tubing and the like. The trunk line pipe runs from about 4″ to 26″ in diameter; the miscellaneous line pipe runs from ⅛ of an inch (in diameter) up to larger sizes. This pipe is either butt-weld pipe in sizes up to 3″ (in diameter) or seamless pipe from 2″ up to 26″ (in diameter). All of the trunk line pipe is seamless pipe. The miscellaneous line pipe consists of a small amount of butt-weld pipe and the balance consists of seamless pipe. I am familiar in a general way with the products sold by Consolidated Steel Corporation. Consolidated makes pipe which is either electric weld or arc-weld

pipe in sizes from 4″ up to, say, 30″. We (National Tube) don't make electric-weld pipe. The pipe that Consolidated makes other than the pipe larger than 26″ is made primarily for and sold to the water works industry and our pipe is sold primarily to the oil and gas industries. We don't make the same type of pipe, and the sizes which we manufacture and the gauges and the lengths are in general different from those made by Consolidated Steel. They only overlap at a very small part of the field in so far as the physical dimensions are concerned. We don't compete with light pressure pipe such as is made by Consolidated. We make high-pressure pipe only. Consolidated makes some pipe for transmission or trunk lines in sizes larger than 26″ which is used similarly to some of our pipe, but we stop manufacture at 26″ and therefore don't compete with this larger type made by Consolidated. The two types of pipe differ as to price, wall thickness and lengths and I assume that they also differ as to cost, judging from prices at which they are sold. I know of no products that are made or sold by Oil Well Supply that compete with products made or sold by Consolidated and in the case of National Tube we don't regard Consolidated as a competitor in the type of pipe in the markets that we sell, because their pipe is of a different type and size. It is a light wall pipe made for irrigation and water transmission purposes at low pressures, which we do not make. The other class of pipe made by Consolidated in the larger sizes than our pipe and in the sizes in between which you may say overlap from the physical dimensions—such pipe comes from within the range of 22 to 26″ in diameter and from 9/32 to ⅜″ wall—does not compete with our pipe and our experiences have been that our prices anywhere in the United States are lower than Consolidated's delivered prices. It has been our experience that the Consolidated product cannot compete

with our products up to the maximum size that we make—26". I can think of one sale made in 1946 where we (National Tube Company) sold the same customer pipe on the same pipe line at the same time. The job in question is the El Paso Natural Gas Company, a trunk line of 730 miles of 26" pipe. We are furnishing approximately 230 miles, another competitor is furnishing 400 miles and Consolidated 100 miles. The National Tube pipe on this line is $31 per ton lower, delivered on the pipe line, than the Consolidated pipe. This particular concern is getting pipe from three sources that were available regardless of the price of the pipe. I know of only one other case where the same customer bought pipe from both Consolidated and National Tube. We sold a relatively small amount of tonnage—two or three thousand tons—24" O/D by 9/32 (inches) walls to the Pacific Gas and Electric Company for delivery to Santa Clara, California. They didn't have enough pipe to do the job they wanted and they bought some pipe from Consolidated, so I am informed, to fill out what they needed, without being delayed by waiting until next year to get some more pipe from us and our pipe set down at Santa Clara is delivered at a lower price than the pipe of the same dimensions coming out of Consolidated's mill, which is very close to the job-site.

Mr. Roach's testimony on the same subject, similarly summarized, was as follows (R. 340-1):

National Tube is making 26" pipe for the El Paso Natural Gas Company, at a cost to the customer of approximately $30 per ton less than the same size pipe that we are supplying for a part of the same line. The only reason that we are able to sell our pipe for that purpose at a price of $30 per ton higher than theirs is that there is no pipe available and having exhausted the market the El Paso Natural Gas Company turned

to us to make some pipe as an emergency for them. We are not able to sell our pipe to customers for the same uses as those for which National Tube Company can sell its pipe when their pipe is available. We do not manufacture or sell any of the types of pipe manufactured by National Tube Company or Oil Well Supply Company.

It is stated in appellant's brief, contrary to the clear evidence in the record, that "The two companies (National Tube and Consolidated) are thus directly competitive as to business which unquestionably is substantial," (App'ts. Br., page 26) and that "a holding that they are not competitive must be predicated upon the assumption that as to the size of pipe which both make, National Tube will hereafter have an advantage in cost of manufacture sufficient to make Consolidated substantially non-competitive. But if plain evidence of competition is to be rejected upon the basis of a *speculative assumption,* it at least must be one reasonably to be inferred from the evidence. Here, however, the pertinent evidence points in the opposite direction" (emphasis supplied). How such a statement could be conscientiously or fairly made in view of the only direct or "pertinent" evidence in the record is inconceivable.

Appellant then proceeds to state further: "Consolidated has recently obtained an unprecedented volume of pipe business and it has constructed additional facilities to handle their business. These circumstances would normally lead to a material reduction in Consolidated's per-unit cost of manufacture." This must be the type of "speculative assumption" to which appellant so aptly refers. Finding No. 20 of the Court below, reading in part as follows: "The two companies do not compete in the sale of their pipe products. Oil Well Supply Company, a United States Steel subsidiary, does not make or sell products which compete with the products fabricated or sold by Con-

solidated'' finds ample support in the testimony of the witnesses McConnor and Roach summarized above.

Other Plate Products.

Consolidated's plate fabrication is its predominant line of business (Plaintiff's Ex. 2, Defendant's Ex. 59, R. 614). Neither American Bridge Company nor Virginia Bridge Company is a fabricator of plate products (R. 147-8). There is, therefore, *no competition* between the two groups, U. S. Steel on the one hand and Consolidated on the other, in *plate* fabrication, which constitutes more than seventy per cent of Consolidated's business.

Fabricated Structural Steel.

The records of the American Institute of Steel Construction showing structural steel bookings for shipment into the Consolidated Market are unavailable after the year 1942 (R. 252). For the six years from 1937 to 1942, inclusive, the total of such bookings into the Consolidated market comprised 1,665,698 tons (Def. Exs. 47, R. 597 and 50, R. 600-1). Of this amount, U. S. Steel supplied 283,846 tons, or 17% of the total (Def. Ex. 50, R. 600-1), and Consolidated supplied 84,533 tons, or 5% of the total (Def. Ex. 50, R. 600-1). During the same period Consolidated's total sales, *exclusive of war work,* totaled 632,126 tons (Def. Ex. 59, R. 614), and therefore its structural steel bookings comprised less than 15% of its total actual sales for the period. Hence, that percentage constituted the maximum area of its total activities in which Consolidated could possibly have been competitive with U. S. Steel. Consolidated's total commercial sales for the ten-year period from 1937 to 1946, inclusive, amounted to 1,002,363 tons (Def. Ex. 69, R. 614). Its structural steel bookings for shipment into the Consolidated market during that period totaled 159,997 tons, or less than 16% of its total bookings (Def. Ex. 59, R. 614); and of this tonnage only 24,162 tons, or 2.4% of its total business, was obtained in

competition with U. S. Steel. During the typical period from 1937 to 1942 other fabricators than Consolidated or U. S. Steel booked more than four times the amount of work booked by both of them in the same territory for the same period (Def. Ex. 50, R. 600-1), and consequently may be presumed to have booked approximately the same greater proportion of such work during the entire ten years period.

The record sets forth (Def. Ex. 57, R. 612) the amount of structural steel business that was obtained by Consolidated in competition with subsidiaries of U. S. Steel. The figures are as follows:

Data for the Ten-Year Period 1937-1946

	No. of Jobs	Tons
Bid by Consolidated	6,377	578,847
Awarded to Consolidated	2,390	159,997
Lost to Competition	3,987	418,850
Lost to U. S. Steel	40	38,920
Lost to Others than U. S. Steel	3,947	379,930
Per cent. of Total Lost to U. S. Steel	.6%	6.7%
Per cent. of Total Lost to Others than U. S. Steel	61.9%	65.6%
Per cent. of Jobs Lost that were taken by Competitors other than U. S. Steel	99.0%	90.7%

The foregoing calculations indicate that Consolidated took only one and five-tenths per cent of the jobs and one and nine-tenths per cent of the tonnage in which U. S. Steel was interested as a bidder; whereas, competitors other than Consolidated took sixty three and six-tenths per cent of the jobs and fifty eight and six-tenths per cent of the tonnage upon which U. S. Steel has bid. The computations show also that ninety seven and eight-tenths per cent of the jobs and ninety six and nine-tenths per cent of the

tonnage lost by U. S. Steel was taken by others than Consolidated.

On the other side of the picture, the salient figures are as follows:

Data for the Ten-Year Period 1937-1946

	No. of Jobs	Tons
Bid by U. S. Steel	2,409	1,273,152
Awarded to U. S. Steel	839	499,605
Lost to Competition	1,570	773,547
Lost to Consolidated	35	24,162
Lost to others than Consolidated	1,535	748,385
Per cent of total lost to Consolidated	1.5%	1.9%
Per cent of total lost to others than Consolidated	63.6%	58.6%
Per cent of jobs lost that were taken by Competitors other than Consolidated	97.8%	96.9%

From the foregoing it appears that only six-tenths of one per cent of the jobs and six and seven-tenths per cent of the tonnage upon which Consolidated bid was lost to U. S. Steel and that others than U. S. Steel took ninety nine per cent of the jobs and ninety and seven-tenths per cent of the tonnage lost by Consolidated to its competitors.

Summary of Argument.

A synopsis of the argument is set forth in the index, (pp. i-iv), and, to avoid repetition, is omitted here.

ARGUMENT.

I.

The Sale Contract does not result in an illegal restraint in the sale of rolled steel products because:

1. During the ten year period from 1937-1946 Consolidated's purchases of rolled steel products from U. S. Steel were approximately one and four-tenths per cent of the total sales of rolled steel products in the Consolidated Market and its purchases from U. S. Steel were only approximately one and five-tenths per cent of such sales.

These facts, we believe, have been accurately set forth in a previous section of this brief entitled "Facts as to Competition in Rolled Steel Products" (pp. 9-12 *supra*). However, certain of the figures contained in various portions of appellant's brief addressed to this question seem to excuse, if not merit, further comment.

Appellant has stated that Consolidated "uses in its business rolled steel products costing about $11,000,000 annually" (App'ts Br. p. 2). Apparently the $11,000,000 figure is reached by averaging Consolidated's total purchases, as shown in Part II of plaintiff's Exhibit 2, (R. 513-4) which amount to $113,936,550, over the entire ten year period. The total purchases shown on this exhibit include substantial quantities of rolled steel products acquired for use in the production of war materials during the years 1942, 1943, 1944, 1945 and 1946 which have no place in determining annual purchases during normal peacetime years. Reference to that portion of plaintiff's Exhibit 2 contained on pages 502-506, incl. of the record, readily indicates that Consolidated's commercial and war tonnage sales may be divided as follows:

War tonnage	1,116,918
Commercial	1,002,363
Total	2,119,281

Percentage of commercial tonnage to total, 47.3 per cent.

(Later herein we will deal with the further statement that U. S. Steel attempted to acquire Consolidated with a monopolistic effect and purpose.)

If the percentage of Consolidated's tonnage of commercial sales to its total sales (war and commercial) is applied to the figure of $113,936,550, its average annual purchases for use in commercial work may be fairly assumed to have been approximately $5,400,000, or a little less than one-half of appellant's inflated figure of $11,000,000.

A substantially similar result is obtained by an examination and analysis of plaintiff's Exhibit 2 (R. 513-514). Therein the total dollar value of rolled steel products purchased by Consolidated during the five years 1937-1940 and 1946 totalled $29,375,890 and the average annual purchases during what may be described as normal years amounted to $5,875,000. Even so the figure is bound to be on the high side since the greater part of Consolidated's purchases in 1946 was used in the completion of its government contracts.*

We assume that plaintiff's statement that Consolidated's normal use of rolled steel products is approximately $11,000,000 annually is intended to impress the Court with the substantiality of its business. We will discuss the importance of this and other figures relating to size in a subsequent portion of our brief. For present purposes, we submit that the figure indicates nothing that tends to dispute the percentage figures that we have set forth nor does it negative our position that Consolidated's purchases were but relatively small in the steel industry, whether such industry is viewed from the national standpoint or from the standpoint of the Consolidated Market.

2. The proposed purchase of Consolidated's assets is not attributable to any conspiracy or other improper motive but to a normal business development in no way prejudicial to the public interest.

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* In 1946 Consolidated's commercial sales were less than eleven per cent of its total sales (Dfts. Ex. 60, R. 615).

The contention of appellant that the sale contract is an illegal restraint of interstate commerce is based upon the erroneous premise that its *purpose* was to prevent all manufacturers of rolled steel products other than U. S. Steel from selling their products to Consolidated. This is a complete misconstruction of the real purpose avowed by U. S. Steel as motivating its action in acquiring Consolidated's assets (R. 381).

Appellant seeks to liken the transaction under consideration here to the factual situation that was adjudged illegal by this Court in the case of *United States* v. *Yellow Cab Company*, 332 U. S. 218 and further argues that "the acquisition of Consolidated is intended to prevent * * * all manufacturers of rolled steel products from selling their products to Consolidated" (App'ts Br. p. 32). That is not a true statement. The record in this case does not support the charge either "that a major purpose of United States Steel in acquiring Consolidated is to procure for itself the entire business of supplying all rolled steel products needed in operation of the acquired enterprise" or that "upon consummation of the acquisition they will be able to effectuate this purpose".

The intended purpose of the acquisition has been fully disclosed. It was not to prevent anyone other than U. S. Steel from doing anything. It was, as the record shows, an assurance of U. S. Steel's ability to market its own products in an area where its present and future competitive position could not otherwise be reasonably certain. The important difference is between self-protection, which it sought, and domination which it obviously could not obtain.

In support of its untenable position in this regard appellant relies (and in the Court below relied) upon the *Yellow Cab* case (*supra*), and states that the factual situations of the two cases are identical. The situation here is not identical with the aspect of the *Yellow Cab* case which was adjudged illegal; it is antithetical thereto. The *Yellow Cab* case was before this Court upon a direct appeal by

the plaintiff from a judgment of the District Court dismissing the complaint for failure to state a claim upon which relief might be granted. The complaint alleged and the motion to dismiss therefore admitted, in legal effect, a conspiracy on the part of the defendants to restrain and monopolize interstate trade in the sale of motor vehicles for use as cabs in violation of Sections 1 and 2 of the Sherman Act. This Court properly pointed out that on such an issue it could "*assume,* without *deciding or implying,* that the various facts and allegations in the complaint are true." (Emphasis supplied.) The complaint further alleged that the defendants over a period of approximately fifteen years consistently followed a plan calculated to result in a monopoly of the business of owning and operating cabs in various large cities of the United States. The numerous steps by which such plan was furthered, all of which were patently directed to such end, were recited in detail in the complaint. This Court was, therefore, not called upon to decide the existence of a combination or conspiracy, since the facts alleged in the complaint were deemed admitted upon motion to dismiss.

In the case at bar there is no allegation in the complaint of such a conspiracy nor does the record support the existence of facts which would justify such a contention. On the other hand, the Court below, upon ample evidence, found to the contrary (Fdg. 56, R. 52).

If it is appellant's suggestion that this Court should conclusively presume the existence of an intent to restrain or monopolize in every transaction in which competition is eliminated from an "appreciable" (but not "substantial") portion of interstate commerce, then appellant is proposing that the long-established and well supported distinction between direct and indirect restraints of interstate commerce must be completely abandoned and that every transaction which results in any restraint ("appreciable" or "substantial") must be declared to be within the inhibitions of the Sherman Act.

As was pointed out by this Court in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238, and repeated with approval in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, "The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains."

Such a rule would extend the application of the Sherman Act far beyond its intent or purpose and would subject to serious question innumerable transactions that are obviously beneficial to industry and are in the public interest.

Adherence to that position completely ignores the rule of reason first enunciated in the case of *Standard Oil Co.* v. *United States*, 221 U. S. 1, as subsequently reaffirmed in the case of *United States* v. *American Tobacco Co.*, 221 U. S. 106, and also fails to take into consideration the oft repeated distinction made by the Courts between the categories of contracts which operate to the prejudice of the public interest: the first, "by *unduly* restricting competition or *unduly* obstructing the course of trade," and the second, which "either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade." These two categories, because of their essentially different treatment by the Courts, may be designated as, first, "indirect restraints" and, second, "*direct*" or "*per se*" restraints.

This distinction was emphasized in the case of *United States* v. *Aluminum Company of America*, 148 Fed. 2d, 416, where, at page 427, the Court said:

> "It is settled, at least as to Section 1 [of the Sherman Act], that there are some contracts restricting competition which are unlawful, no matter how beneficent they may be; no industrial exigency will justify them; they are absolutely forbidden. Chief Justice Taft said as much of contracts dividing a territory among producers, in the often quoted passage of his opinion in the Circuit Court of Appeals in *United States* v. *Addystone Pipe & Steel Co.*, 6 Cir., 85 Fed.

271, 291, 46 L.R.A. 122. The Supreme Court unconditionally condemned all contracts fixing prices in *United States v. Trenton Potteries Co.*, 273 U. S. 392, 397, 398, 47 S. Ct. 377, 71 L. Ed. 700, 50 A.L.R. 989, and whatever doubts may have arisen as to that decision from *Appalachian Coals Inc. v. United States*, 288 U. S. 344, 53 S. Ct. 471, 77 L. Ed. 825, they were laid by *United States v. Socony-Vacuum Co.*, 310 U. S. 150, 220-224, 60 S. Ct. 811, 84 L. Ed. 1129. It will now scarcely be denied that the same notion originally extended to all contracts—'reasonable,' or 'unreasonable'—which restrict competition. * * * The decisions in *Standard Oil Co. v. United States*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L.R.A., N. S., 834, Ann. Cas. 1912D, 734, and *American Tobacco Co. v. United States*, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663, certainly did change this, and since then it has been accepted law that *not all contracts which in fact put an end to existing competition are unlawful.*" (Emphasis supplied.)

The sale contract with which the Court is here concerned does not unduly restrict competition or unduly obstruct the due course of trade nor is it unlawful in its inherent nature. United States Steel's stated purpose was not, as appellant says, to "preempt" Consolidated's purchases of rolled steel products in the sense that that word ordinarily implies. The testimony of Mr. Fairless was that it was obvious to him that if U. S. Steel acquired Geneva, it must have structural steel fabricating facilities on the West Coast; and that his purpose in negotiating and consummating the sale contract "was just one, one motive and only one motive, and that was to secure sufficient background to operate the newly acquired Geneva steel plant on a successful basis from the standpoint of furnishing employment to almost six thousand employees and also fulfilling the obligation which we had made with the Government and to the citizens of the West that we would, to the best of our ability, operate that plant successfully and in the interests of building up the industrial west. That was the only objective that I

had at that time and the only one I still have" (R. 379, 381).

It is of course obvious that any purchaser of materials or facilities in interstate commerce prevents another from making the same purchase, and as was said in the *Joint Traffic* case, 171 U. S. 568, its language being approved in *U. S. v. American Tobacco Co., supra,* "the Act of Congress [referring to the Sherman Act] must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing on interstate commerce and possibly to restrain it."

If appellant's position with regard to the sale contract were to be sustained, "the fundamental right of freedom to trade which on the very face of the Act it was enacted to preserve" (*U. S. v. American Tobacco Co., supra*) would be completely annihilated. If any one rule of interpretation of the Sherman Act is certain from the decisions of this Court it is that not every contract which has a trade restraining effect is prohibited, and further that (except for contracts which constitute a direct or *per se* restraint) only those contracts which *unduly* or *unreasonably* restrain trade may be found illegal.

Proceeding from that point, it is apparent from the authorities that we are not without guide to enable us to determine when a trade restraint is undue or unreasonable. This guide has been stated to be that the *standard of legality is the absence or presence of prejudice to the public interest.* Many authorities on this point might be cited but it appears sufficient to refer to those portions of the opinion in the *American Tobacco Company* case quoted above and to the following language of this Court from *International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291, at page 298. "*In Standard Oil Company v. Federal Trade Commission,* 282 Fed. 81, 87, the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the

Sherman Act, namely, that the standard of legality was the absence or presence of prejudice to public interest by unduly restricting competition or unduly obstructing the due course of trade."

Appellant is, therefore, relegated to the position of demonstrating from the record that an undue or unreasonable restraint results from the contract under consideration. A fair analysis of the facts therein disclosed not only will not support this position but will demonstrate it to be utterly groundless. The Columbia-Consolidated transaction is not a direct trade restraint nor is it *per se* illegal. It has no price-fixing purpose or potentiality. U. S. Steel, as a result of the agreement, will not increase its production capacity of rolled steel products by a single ton. It will not be in a position to dominate the market in fabricated steel products or to fix or to control their prices. The purposes that the parties sought to achieve by the transaction were, as has been pointed out, entirely lawful. Such was not the case in the authorities upon which appellant relies. All of them had to do with direct or *per se* restraints which "either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrain trade". They may be analyzed in their relation to the immediate problem as follows:

U. S. v. Yellow Cab Company, 332 U. S. 218. The inapplicability of this case has already been substantially commented on above.

United States v. Crescent Amusement Company, 323 U. S. 173. Here a combination of corporations engaged in operating motion picture theatres closely knit together by interlocking directorates and, in many instances, by the same officers, as well as by stock ownership, combined to use their buying power *for the purpose* either of restricting the ability of their competitors to license films or of eliminating competition by acquiring a competitor's property. For example, in towns where competing theatres were operated it was their practice to refuse to show any pic-

tures of any distributor who refused to grant them exclusive exhibition rights. Crescent's competitors, not being able to renew their contracts for films, would frequently go out of business or come to terms and sell out to the combination with an agreement not to compete in a specified area for a term of years. On some occasions, a mere threat to the competitor would be sufficient to cause him to sell out and stay out of business in a territory far beyond that required for the protection of the business that was sold. By procuring franchises from the defendant distributors and by providing for repeat runs, Crescent and its affiliates effectively prevented the sale of many feature pictures to their competitors. In the words of the Court "The plan here was to crush competiton * * *". Although the amount of trade restrained by this illegal plan was not substantial, the combination itself was a direct restraint and consequently illegal *per se*. Therefore, the substantiality of the trade restrained became immaterial.

United States v. *Lehigh Valley Railroad Co.*, 254 U. S. 255. In the *Lehigh* case, the decree was for the dissolution of a combination composed of Lehigh Valley Railroad Company, Lehigh Valley Coal Company and Lehigh Valley Coal Sales Company, which attempted to monopolize and control the railway tonnage originating in the anthracite coal fields in Pennsylvania. As early as 1868 (before the passage of the Sherman Act) and, consequently, in violation of no statute, the railroad company entered upon a policy of acquiring by purchase and lease to control of as much as possible of the anthracite coal-containing lands tributary to its lines of railroad *for the purpose* of preventing or, when it had become established, of suppressing competition in the carrying of coal over its lines to interstate markets. The various companies involved had substantially the same officers and interlocking directorates and the railroad company, as the owner of the stock of the coal company, controlled the election of the latter's directors. The coal company was such an instrumentality of the rail-

road company that the latter treated the coal company's earnings as its own so that in the last analysis the assets of the coal company were the assets of the railroad company, *as admitted by the defendants.*

The objects of the combination were pursued after the effective date of the Sherman Act and were still in effect at the time of the filing of the complaint, unless they were cured by the organization in 1912 of a sales company. In that year, a sales company was so organized and the privilege of subscribing for its stock was extended to the common and preferred shareholders of the railroad company, which promptly declared a dividend sufficient in amount to enable its shareholders to purchase the newly issued stock, which they did, to the extent of ninety-seven per cent thereof. There was such intimate control of the sales company that the railroad's contract with it was essentially a contract with itself. The sales company was required to sell no coal for itself or for anyone other than that purchased from the coal company, and the coal company leased all of its facilities to the sales company. *The whole purpose of the defendants in that case to control the mining, transportation and sale of coal was so clear as to admit of little argument or denial.*

The effects of the combination were inseparable from its purpose. Extensive coal purchases resulted in controlling the shippers and the supply of their product, coal. Freight revenues were assured and the only road to interstate markets for coal producers in that production area was subject to manipulation. The purpose and policy of the company was clear and was pursued despite adequate knowledge of illegality. The degree of economic power gained by the combination blanketed the major economic life of the entire production area and had a direct effect on the prices paid for both shipping charges and coal in the interstate markets by virtue of control over both coal production and its transportation to market, with the consequence of yielding an important leverage in the supply

of coal and its price at the seaports. The facts in that case demonstrated that both power and its abuse existed. Under such circumstances and in the face of such a direct restraint, the illegal purpose of the combination rendered the amount of commerce actually affected immaterial.

United States v. Reading Company, 253 U. S. 26. In the *Reading* case, as in the *Lehigh* case, the combination commenced prior to the passage of the Sherman Act and was admittedly due to a desire on the part of the Reading Company to quash all competition. The combination was effected through a holding company that was created for the express purpose of securing a dominating control over the coal of the Schuylkill Field in Pennsylvania and over its transportation to the market.

The Court said, at page 775: "This board of directors, obviously, thus acquired power: to increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain commerce within the meaning of the Act."

In relying on this case, appellant ignores the fact that it was not the "effect" of the acquisition, insofar as the amount of trade restrained was concerned, but the purpose of the acquisition that clearly violated the Act.

United States v. Socony Vacuum Oil Company, 310 U. S. 150. The record in the *Socony Vacuum* case clearly disclosed that the primary purpose of the combination of the defendants was to fix prices. Such purpose made the plan of oil purchases illegal *per se* and constituted a direct restraint on trade.

Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457. In this case, the findings of the Federal Trade Commission, upon which the determination of

the Court was based, were that the agreement between the members of the guild accomplished the following results: (1) it narrowed the outlets to which garment and textile manufacturers could sell and the sources from which they could buy; and (2) it subjected all retailers and manufacturers who declined to comply with the program of the guild to an organized boycott. If for no other reason than the latter, the Court was justified in confirming the Commission's cease and desist order, regardless of the amount of interstate commerce affected.

International Salt Company, Incorporated v. *United States*, 332 U. S. 392. It was clear from the record in this case that the leases through which the appellant controlled the price of salt were basically price-fixing agreements, and the Court held that "not only is price fixing unreasonable *per se* * * * but also, it is unreasonable *per se* to foreclose competitors from any substantial market." Again, the quantity of commerce affected became immaterial in view of the direct or *per se* character of the restraint complained of.

United States v. *Union Pacific Railroad Company*, 226 U. S. 61. In the *Union Pacific* case, the restraint complained of contained the element, absent here, of direct effect upon the public interest, and in Mr. Justice Brewer's concurring opinion, it was stated:

> "It must be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly."

And, as far as the public was concerned, the Court said:

> "The consolidation of two great competing systems of railroad * * * creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends

to higher rates." (Citing the *Joint Traffic Association* case.) "It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in attention to and prompt adjustment of the demands of patrons for losses."

None of the foregoing cases cited by appellant is pertinent or applicable to the instant situation. The most that can be said for them is that they hold that price-fixing and combinations or conspiracies *for the purpose* of dominating a market are either direct or *per se violations* of the Sherman Act. The effect upon any market must be considered in direct relation to its effect upon the public interest. An acquisition, the unlawfulness of which must be determined by its economic consequences from which *inferences* of its purposes are raised, is in direct contrast with a conspiracy or an agreement or combination unlawful *per se*. The economic consequences of the Columbia-Consolidated contract raise no inference of unlawful purpose or intent and, indeed, the evidence of witnesses whose credibility the Trial Court was called upon to determine conclusively demonstrates that the object of the acquisition was "normal expansion to meet the demands of a business growing as a result of superior and enterprising management" (*U. S.* v. *Reading Company, supra*).

Appellant apparently seeks to have this Court determine that the word "appreciable" may be substituted for the word "substantial" in determining the extent of trade restraint that is forbidden by the Sherman Act. "Appreciable" is defined in the latest edition of Webster's International Dictionary as follows: "Large or material enough to be recognized or estimated; perceptible; as an appreciable quantity." Such a limitation on the quantity of trade or competition that falls within the inhibitions of the Act has never been adopted or suggested by the Courts where no direct or *per se* rest aint was involved, and it is unthinkable that the Congress could have intended to pro-

hibit all "appreciable" restraints. Any purchase of any article involved in interstate commerce quite obviously effects an appreciable restraint on the ability of another to purchase the same article.

The restraint of an appreciable segment of commerce may be enjoined if a direct or *per se* violation of the anti-trust laws is its basis; but no case has changed the rule that an indirect restraint is not violative of the law unless it is substantial.

3. It is not the law that the purchase by a manufacturer of an outlet for its products, *absent an intent to restrain or monopolize and absent a resultant unreasonable restraint of interstate commerce,* violates Section 1 of the Sherman Act.

The simple facts of the transaction here involved are these: Columbia, a producer of rolled steel products, proposes to purchase the assets of a fabricator of both structural and plate products for valid and logical business reasons which have been fully and frankly explained (R. 342, 381). As a result U. S. Steel's competitive position on the West Coast will be improved and its competition with the largest integrated steel company doing business in that region, Bethlehem (R. 201), is certain to be substantially increased.

Appellant does not claim that the transaction complained of will either eliminate or reduce competition between other fabricators. On the other hand, it is apparent that competition on the West Coast in the fabricating industry will be increased by the entry into the field of an active organization capable of fabricating any type of work with the result that the public, that is the users of fabricated steel products, will be the ultimate beneficiaries and the public interest will be served rather than injured.

Practically all of the evidence introduced by appellant was furnished to it by the defendants at or prior to the time of trial and no direct testimony other than statistical

data, analyzed, re-analyzed, re-vamped and re-computed in an effort to pull a tenable theory out of the statistical mass, is available as the basis for the conclusions that appellant asks the court to reach. Out of the hundreds of available witnesses familiar with the Consolidated Market and the competition therein, not one was called by appellant to testify to the existence of facts that would have been pertinent to appellant's charges of trade restraint or monopoly.

It is utterly impossible that the Columbia-Consolidated purchase could bring about unreasonable advantages over competitors not similarly integrated, as the record shows that competition on the part of non-integrated companies has been active and substantial throughout the entire period covered by the evidence introduced in this proceeding (R. 336).

II-A.

1. There is no substantial competition between the two companies in the structural steel business.

They normally bid on *different types* of structural steel work. During the ten year period from 1937 to 1946 the jobs bid by both companies were only one and nine-tenths per cent in number and seven and one-tenths per cent in tonnage of all jobs bid by the two companies combined; the jobs bid by U. S. Steel on which Consolidated also bid and which U. S. Steel lost to Consolidated constituted only one and five-tenths per cent in number and one and nine-tenths per cent in tonnage of the total jobs bid by U. S. Steel; the jobs bid by Consolidated on which U. S. Steel also bid and which Consolidated lost to U. S. Steel were only six-tenths of one per cent in number and six and seven-tenths per cent in tonnage of the total jobs bid by Consolidated (pp. 20-22 *supra*).

The facts as to the extent of competition between U. S. Steel and Consolidated in structural steel products have been fully developed in a previous section of this brief

(pp. 21-22). Appellant, however, asserts that Consolidated's competition has covered the entire range of U. S. Steel's structural steel products and has been significantly successful therein. It is an obvious fallacy to state that in U. S. Steel's entire range of products it has been met by Consolidated's competition. Appellant must refer in this regard to the *types* of structural steel products enumerated in Defendant's Exhibits 54, 55 and 56 (R. 606-611) and not to the numbers of jobs obtained by each. These exhibits delineate the various kinds of structural products on which both Consolidated and U. S. Steel bid and they also support the oral testimony that Consolidated was successful in securing jobs mainly in those instances where the structural work was of a lighter character than those as to which U. S. Steel's superior structural steel facilities secured for it a definite competitive advantage.

It is suggested (Appt's. Br., p. 21) that the fact that either U. S. Steel or Consolidated captured more than half of the tonnage on the jobs on which they both bid indicates how serious a diminution of competition would result if either company were eliminated as a competitor. Appellant understandingly fails to note that during the period in question the two companies bid on 8,620 jobs and that of this total there were only 75 which both bid on and which one or the other took. In other words, only eighty-seven one hundredths of one per cent of the total number of jobs bid on by the two companies was taken by either of them. In the case of tonnage of such jobs, the two companies both bid on a total of 1,729,646 tons of which 63,082 tons were taken by one company or the other—a total of three and sixty-four one hundredths per cent of such entire tonnage. As a matter of fact the 166 jobs on which common bids were made amounted to only one and nine-tenths per cent of the total jobs bid on by both companies. If any two facts are clear from the record it is that the total competitive area between U. S. Steel and Consolidated in structural steel products is extremely limited and that even in that small

area there are particular types of work as to which one or the other has a distinct advantage. U. S. Steel by virtue of its facilities is peculiarly adapted to the handling of heavy structural jobs and by virtue of the fact that freight rates constitute but a comparatively small percentage of the cost of complicated heavy structural work has a distinct advantage over Consolidated. Consolidated, on the other hand, with freight rate advantages has, at the outset of bidding, a corresponding advantage as to lighter structural work. These respective advantages are quite clearly reflected in the number of successful bids by each company, as shown in Exhibits 53, 54, 55 and 56 (R. 604-611). Thus, while slight competition in this field exists between them, the results are generally resolved by the type of end product that each company can turn out. In this respect the instant case is far stronger than the case of *International Shoe Company v. Federal Trade Commission, supra.*

2. The structural business constitutes less than 30 per cent. of Consolidated's total business, since its predominantly substantial line (more than 70 per cent.) is *plate* fabrication in which U. S. Steel is engaged and appellant does not even argue or charge that there is *any* competition between U. S. Steel and Consolidated in the latter's principal and predominant line of business.

The insubstantial competition between U. S. Steel and Consolidated is further emphasized by the fact that it was conclusively shown and not contradicted that, of Consolidated's total business, less than 30 per cent consists of *structural* fabrication and that in the remaining 70 per cent U. S. Steel produces nothing that qualifies it as a competitor. The figures in this regard are beyond dispute and are amply set forth in defendant's Exhibits 59 and 60 (R. 614-615). Since appellant does not now argue that competition exists in plate fabrication we shall not belabor this point.

II-B.

The companies are normally engaged in *different types* of the pipe business. Two experts in this field testified unequivocally that there is *no competition* between U. S. Steel and Consolidated in the pipe business, and that testimony stands uncontradicted in the record.

Appellant argues that both U. S. Steel and Consolidated make and sell pipe for oil and gas pipe lines and that in some instances each has supplied a part of the pipe for two particular lines. Appellant's argument in this respect constitutes a play on words. Although both companies produce pipe and although the pipe produced by each has been made and sold "for oil and gas pipe lines and that in some instances each has supplied a part of the pipe for a particular line," it is nevertheless a fact, established by the record, that U. S. Steel and Consolidated are not competitive in the pipe business. Appellant, in its zeal for a reversal of the judgment of the District Court, completely neglects the clear and unequivocal statements of witnesses McConnor and Roach, quoted *in extenso* above. It is only because of the exigencies of the moment that the purchases referred to in the language just quoted were made from Consolidated. To ignore the existing situation is to construe unfairly the uncontroverted facts that appear in the record. Our case in this respect rests squarely upon the testimony of the witnesses who testified, whose sworn affirmations were subject to cross-examination, and who were undisputed by any witness produced by appellant.

II-C.

Potential competition rests upon speculation and conjecture and hence cannot constitute the basis for injunctive relief.

Appellant has advanced the astounding contention that because, during World War II, both U. S. Steel and Con-

solidated built substantial quantities of ships for the United States Government, such production demonstrates that the two companies are capable of making competing products whenever circumstances make such production desirable; that, consequently, their "competitive potential" is enormous and, assumedly, that this "potential competition" must be protected from restraint. We submit that the purposes of the Sherman Act are sufficiently clear to justify complete disregard of this absurd suggestion. The act operates in relation to contracts, combinations, conspiracies and monopolies that either exist or are threatened. To ask the courts to act with relation to a contract, combination, conspiracy or monopoly that may relate to trade or commerce in articles that no party to such alleged contract, combination, conspiracy or monopoly produces or intends to produce in the future is to request judicial action in a completely moot case.

The court below recognized the fallacy of appellant's suggestion when called upon to rule upon an objection to a question regarding Consolidated's boiler business, which previously had been abandoned. The question by plaintiff's counsel was (R. 365): "There is nothing to keep you from going back in" [the boiler business], and in commenting on an objection to this question because of its irrelevancy, the Court stated: "Wouldn't that apply to every individual and every company, as well as this one?"

Mr. Wright (counsel for plaintiff): "I think we are concerned here to some extent with the degree of potential competition that is involved."

The Court: "Of course, I am going to allow the question, but would not the potential competition involve every company of any size or every individual that has any equipment?"

Under such an attenuated theory, there are few manufacturers or producers of substantial capacity in the United States that are not potential competitors with in-

numerable other large manufacturers or producers, even though their current lines of product and the articles that they have manufactured over a period of many years may be completely different. It is a matter of common knowledge that during the war, companies that had never produced ships, ammunition, armament or other war material were called upon to do so and answered the call. Appellant's theory, therefore, would make the Chrysler organization a competitor of Baldwin Locomotive Works, and International Harvester a competitor with Winchester Arms. It is with no such imaginative competition that the Sherman Act deals or which it contemplated. Competition or its restraint can be measured only in terms of actualities and not in terms of supposititious potentialities.

It is true that the Courts have held that a suppression of potential competition, where the evidence demonstrated a collective and concentrated power which could control a market, could be restrained, but in all of the opinions where the words "potential competition" are used, the power to restrain was exercised or existed with relation to competition in the same line of business and not with relation to competition in some other line of endeavor that might be undertaken in the future. For instance in the *Reading* case the potential competitors were all active in the anthracite coal market and in the operation of railroads. In the case of *United States v. Standard Oil Company of New Jersey*, 47 Fed. 2d 288, the court also dealt with potential competition and considered it as a probable future competitive condition, but again such competition was in the petroleum products with which both Standard Oil of New York and Vacuum Oil Company dealt—not competition between them in the production and sale of other products than those that they currently produced and sold.

Appellant has not cited, and there cannot be found, any authority for the protection of "potential competition" between companies who do not deal with articles in a competitive market but because of their resources may have

the potentialities to engage in other activities which, *if they did,* would make them competitors.

II-D.

The purchase by one company of assets of a competitor does not, under the circumstances of the case, violate the Sherman Act. This legal proposition advanced by appellant we challenge.

The purchase by one company of the assets of a competitor does not, under the circumstances of this case, violate the Sherman Act. While paying lip service to the decisions of this court to the effect that the acquisition by one company of the assets of another is unlawful only where a substantial lessening of competition is involved, appellant apparently seeks to have this contract declared unlawful upon the mere ground that Consolidated's business will be brought under the purchaser's ownership. Such a suggested theory is *contra* to innumerable pronouncements of the courts vested with authority to construe and enforce the anti-trust laws.

This exact point was determined adversely to any such contention in *U. S.* v. *Standard Oil Company of New Jersey,* 47 Fed. 2d 288. *All* competition between the acquiring company and its competitor was eliminated. Nevertheless the relief sought by the Government was denied because the competition was not sufficiently substantial to affect the public interest adversely and the competition remaining was sufficient to protect such interest.

It was likewise so determined in the case of *United States* v. *Republic Steel Corporation,* 11 Fed. Supp. 117, where the Court held:

> "The elimination in such cases of the competition between the merging corporations is, in reality, a step in the strengthening of competition between the units vitalized thereby and the general industry. Therefore, instead of the probability of injury to the public resulting from the consummation of such merger the interest of the public will be enhanced."

There is no controversy between appellee and appellant in the statement that "the statute is aimed at substance rather than form" (App'ts. Br., p. 51). This principle applies as well to the substantiality of the competition restrained as it does to the nature of the restraint. Where such competition is *de minimis* the protective arm of the Courts has never been extended. In urging that "it is the character of the restraint, not the amount of commerce affected, which is controlling in determining whether a violation of Section 1 has occurred" (Ptfs. Br., p. 51), appellant cites the *Socony Vacuum* and the *Yellow Cab* cases, but no isolated excerpts from the opinions of the Court therein serve to controvert the fact that the *Socony Vacuum* case and the *Yellow Cab* case were, respectively, based upon a price-fixing combination and upon an admitted conspiracy to restrain commerce.

Appellant also argues that if the parties here had indulged in a price-fixing agreement, since their competitive business was "appreciable", the illegality of such a transaction would have been beyond question and consequently urges that a purchase affecting "an appreciable segment of interstate trade" constitutes a combination forbidden by the Sherman Act. It then further argues that the "rule of reason" cannot be applied to save the transaction from condemnation.

This, of course, suggests that the Court abandon the rule of reason and depart from the logic of every previous decision on the anti-trust laws where the Government's contentions have not been upheld. The adoption of such a view would tear down and annihilate the entire structure of the anti-trust laws of this country as they have been construed for half a century. When or why this desire to depart from the rule of reason was born is difficult to ascertain. Presumably it came into being after June 17, 1946, when the Attorney General, in an opinion addressed to the Administrator of the War Assets Administration on the subject of the purchase by United States Steel Cor-

poration of the Geneva Steel plant speaking for the Department of Justice, quoted the language in the case of *U. S.* v. *Aluminum Company of America* (*supra*), as follows:

> "The percentage we have already mentioned—over ninety—results only if we both include all 'Alcoa's' production and exclude 'secondary'. That percentage is enough to constitute a monopoly; *it is doubtful whether* sixty or sixty-four per cent would be enough; and certainly thirty three per cent is not."

He then further said:

> "The *Aluminum Co.* case was cited with approval and at length by the Supreme Court in the recent case of *The American Tobacco Company* v. *United States*, 14 LW 4409 (decided June 10, 1946).
>
> "In the light of the foregoing considerations and all the other pertinent circumstances of the case, I do not view the sale, as such, of this property by the War Assets Administration to the United States Steel Corporation as a violation of the anti-trust laws."

It is of peculiar interest that the percentages involved in the case at bar do not approach those percentages that the Attorney General then felt to be insufficient to justify a conclusion on his part that they would violate the anti-trust laws. We contend that the theory now advanced by the Department of Justice should be disapproved by this Court not only as violative of the law and of individual rights but as destructive of the public interest.

III.

The record is devoid of any proof of a monopolistic attempt and on the contrary contains a positive showing of U. S. Steel's lawful purposes.

The monopoly charge contained in the complaint is directed at the other appellees. There is no suggestion that this appellee is a party to any monopolistic effort.

Consequently, we feel that, having argued the beneficial advantages of the transaction fully in so far as they affect the other charges in the complaint, this phase of the case should be presented in the brief of United States Steel Corporation and its affiliates here involved.

IV.

Unless contrary to a clear public policy and to the public interest, Consolidated should not be deprived of its ordinary, basic and fundamental right to sell its business.

The right to buy and sell is an elementary right of free people. It serves to give a desirable fluidity and flexibility to a free economy. It is, therefore, in the public interest that the right should not be interfered with or abridged unless clearly necessary for the implementation of an overriding public policy.

Sound business reasons moved the officers, directors and stockholders of Consolidated to sell. The decision was unaccompanied by any unlawful act or design. Appellant would have the court hold the proposed sale unlawful merely because *some* ("appreciable") lessening of competition is involved.

Every sale of a business *ipso facto* involves some appreciable lessening of competition, but the sale is not on that account to be likened to acts or transactions which from their very nature are condemned by the law, such as agreements to restrict production, to divide up territory, etc. There is nothing inherently wrong in this proposed sale by Consolidated. Its right to make the sale is as sacred as any other property right. To deprive it of such right without contravening paramount public considerations would be unjust to its stockholders. To justify such deprivation something more than the result which ordinarily flows from a lawful act is essential and it is well established by the decisions of this court that a *substantial* lessening of competition is a necessary prerequisite to the court's intervention.

Only a trifling or negligible lessening of competition is involved in the proposed sale and it is a fair implication that appellant recognizes that there is no substantial competition because it is attempting to have the court hold that the elimination of less than substantial competition renders the contract unlawful. Neither statute nor public policy nor public interest calls for or justifies such an interference with the individual's freedom of contract.

Conclusion.

It is obvious that appellant seeks herein not to apply the long established rules of interpretation of the Sherman Act but instead to extend the scope of its limitations far beyond any limits to which the Courts have heretofore subscribed.

We respectfully submit that there has been no showing that the proposed acquisition will be detrimental or prejudicial to the public interest, that there has been no undue or unreasonable restraint of trade within the meaning of the Sherman Act and that the judgment of the lower Court should be affirmed.

Respectfully submitted,

ALFRED WRIGHT,
AARON FINGER.